Sok-Chun Tang v Vincent Tang Fook Lam & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S7-790 OF 1989
JAMES FOONG J
28 JANUARY 1999

Negotiable Instruments *— Promissory note — Presumption of consideration under s 30 of the Bills of Exchange Act 1949 — Whether debtor had rebutted presumption*

Limitation *— Administration action — Action by beneficiary to recover trust property held by executor as trustee — Whether limitation period applied — Limitation Act 1953 s 22(1)(b),(2) & (3)*

Succession *— Executors — Appointment of — Borrower appointed executor — Whether appointment of borrower as executor extinguishes the debt*

The plaintiff (one of the beneficiaries under a will) sued the defendants (executors and trustees and beneficiaries under the same will) for the return of a sum of RM2.9m with interest to the estate of the deceased (their mother), or a lesser sum to the plaintiff as her entitlement under the terms of the will. The claim was based on a promissory note for RM2.9m with interest of RM15,000 per month, signed by the first defendant, which was found in the deceased's safe deposit box. The suit was only heard against the first defendant. The first defendant denied the debt, or in the alternative contended that even if the debt existed, it was extinguished by his appointment as an executor of the estate; and as the loan was allegedly given on separate occasions, the claim is statute barred since more than six years could have lapsed.

Held, allowing the plaintiff's claim:

(1) There was a loan given by the deceased to the first defendant evidenced by the promissory note and the statement of accounts recording payments from the first defendant to the deceased after the promissory note was signed. The consideration for the note may not have been cash but was probably in the form of shares which the deceased had transferred to the first defendant. The first defendant had failed to rebut the presumption of consideration pursuant to s 30 of the Bills of Exchange Act 1949 (see p 285B–F).

(2) The appointment of the first defendant as executor did not extinguish the loan. In equity, he was deemed to have repaid the loan disclosed in the promissory note to himself as executor and trustee of the deceased's estate, and thus possessed the full amount of the debt in his hands. He had failed to rebut this presumption as he had failed to show that the deceased had clearly and continuously intended to forgive the debt. The fact that the deceased had not destroyed the promissory note but kept it in her

A own safe deposit box, and had confided the loan to another daughter, was indicative that the deceased had not released the first defendant of his obligation to pay (see p 286C–H).

(3) Applying the equitable legal concept that the loan was repaid by the first defendant as a debtor to himself as executor of the deceased's estate, the first defendant had become a trustee of this repaid debt, which had become a part of the trust property of the deceased's estate. Since the plaintiff was bringing the action as a beneficiary to recover the debt from the defendant as trustee of the estate holding the trust property, under s 22(1)(b) of the Limitation Act 1953, no statutory period of limitation applied against the plaintiff (see p 287G–H).

(4) Even if s 22(1)(b) of the Limitation Act is not applicable, the action still fell within the period of six years prescribed by s 22(2) of the same Act, whether taking the date on which the right of action accrued as the date of the death of the deceased, or the date when the promissory note became payable on demand (see pp 287I–288A).

[Bahasa Malaysia summary

Plaintif (seorang benefisiari di bawah satu wasiat) telah menyaman defendan-defendan (wasi dan pemegang amanah dan benefisiari di bawah wasiat yang sama) untuk pemulangan wang sejumlah RM2.9 juta bersama faedah kepada harta pusaka si mati (ibu mereka), atau untuk sejumlah wang yang kurang (lesser sum) kepada plaintif sebagai haknya di bawah terma wasiat. Tuntutan tersebut adalah berdasarkan nota janji hutang untuk wang sejumlah RM2.9 juta berserta dengan faedah sejumlah RM15,000 sebulan yang ditandatangani oleh defendan pertama, yang telah dijumpa di peti simpanan si mati. Tindakan guaman tersebut telah didengar terhadap defendan pertama sahaja. Defendan pertama telah menafikan hutang tersebut, atau secara alternatif berhujah bahawa biarpun hutang tersebut wujud, hutang tersebut dihapuskan oleh perlantikannya sebagai wasi harta pusaka; dan oleh kerana pinjaman tersebut yang kononnya diberi pada beberapa masa yang berlainan, tuntutan tersebut adalah dihalang oleh statut (statute barred) kerana lebih daripada enam tahun mungkin telah berlalu.

Diputuskan, membenarkan tuntutan plaintif:

(1) Terdapat pinjaman yang diberi oleh si mati kepada defendan partama yang dibuktikan dengan nota janji hutang dan penyata akaun yang merekodkan pembayaran dari defendan pertama kepada si mati selepas nota janji hutang ditandatangani. Balasan bagi nota mungkin bukan dalam bentuk tunai tetapi kemungkinannya adalah dalam bentuk syer yang telah dipindahmilikkan oleh si mati kepada defendan pertama. Defendan pertama telah gagal untuk mematahkan anggapan

balasan (rebut presumption of consideration) menurut s 30 Akta Bil Pertukaran 1949 (lihat ms 285B–F).

(2) Perlantikan defendan pertama sebagai wasi tidak menghapuskan pinjaman tersebut. Di ekuiti, dia telah disifatkan sebagai telah membayar balik pinjaman yang terkandung dalam nota hutang janji kepada dirinya sebagai wasi dan pemegang amanah harta pusaka si mati, dan telah memiliki hutang sepenuhnya dalam tangannya. Dia telah gagal untuk mematahkan anggapan ini kerana dia gagal menunjukkan bahawa si mati secara jelas dan berterusan telah berniat untuk memaafkan hutang tersebut. Hakikat bahawa si mati tidak memusnahkan nota janji hutang tetapi menyimpan di dalam peti simpanannya, dan telah memberitahu tentang hutang tersebut kepada seorang anaknya yang lain menunjukkan bahawa si mati tidak melepaskan defendan pertama dari tanggungjawabnya untuk membayar hutang (lihat ms 286C–H).

(3) Menggunakan konsep undang-undang ekuiti bahawa pinjaman telah dijelaskan oleh defendan pertama sebagai penghutang kepada dirinya sebagai wasi harta pusaka si mati, defendan pertama telah menjadi pemegang amanah hutang yang telah dijelaskan yang kemudiannya telah menjadi sebahagian daripada harta amanah harta pusaka si mati. Oleh kerana plaintif telah memulakan tindakan ini sebagai benefisiari untuk mendapat balik hutang dari defendan sebagai pemegang amanah harta pusaka yang memegang harta amanah, di bawah s 22(1)(b) Akta Had Masa 1953, tidak ada had masa statutori terpakai terhadap plaintif (lihat ms 287G–H).

(4) Walaupun jika s 22(1)(b) Akta Had Masa tidak terpakai, tindakan tersebut masih di dalam jangka waktu tempoh enam tahun yang diperuntukkan oleh s 22(2) Akta tersebut, sama ada dengan mengambil tarikh hak tindakan bermula sebagai tarikh si mati meninggal dunia, bermulanya tarikh apabila nota janji hutang harus dibayar atas tuntutan (lihat ms 287I–288A).]

Notes

For cases on promissory notes, see 10 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 753–783.

For cases on executors, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1828–1901.

For cases on limitation in administration actions, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1752–1765.

Cases referred to

Appleby, Re; Leveson v Beales [1891] 3 Ch 422

Bourne, Re; Davey v Bourne [1906] 1 Ch 697

Hyslop, Re; Hyslop v Chamberlain [1894] 3 Ch 522

Ong Guan Hua v Chong [1963] MLJ 6
Lee Siew Kow, decd, Re Estate of; Gan Eng New & Ors v Yeo Siew New [1951] MLJ 224
Strong v Bird (1874) LR 18 Eq 315
William v Wilcos 112 ER 857

Legislation referred to

Bills of Exchange Act 1949 ss 30(1), 88(1), 94(1)
Limitation Act 1953 s 22(1)(b),(2),(3)
Rules of the High Court 1980 O 80 r 2(1)

Lim Chor Pee (*Siew Suet Peng* with him) (*Chor Pee Anwarul & Co*) for the plaintiff
Cecil Abraham (*Raja Singam* with him) (*Shearn Delamore & Co*) for the defendant

James Foong J:

Background

On 21 February 1987 one Magdelene Tang @ Fung Yok Ying ('the deceased') died in Hong Kong at the age of 73. She left a will naming her two sons — the first and second defendants — and one daughter Dr Elizabeth Tang Suk Yee ('Elizabeth') to be the executors and executrix respectively of her estate. The beneficiaries of her will were all her five children (which included the executors and executrix), entitled to her estate in equal shares. The plaintiff in this case is one of the beneficiaries. Due to some delays, which were much associated with the issues in this case, probate was finally extracted on 6 February 1996. Elizabeth having earlier withdrawn her consent to be an executrix left the first and second defendants to be the joint executors of the deceased's estate.

On 6 July 1987, upon opening a safe deposit box bearing the number 282 maintained by the deceased with Chartered Bank, Benting Branch in Kuala Lumpur, bearing No 282, among other valuables and personal effects of the deceased, two promissory notes issued by the first and second defendants respectively to the deceased were recovered. The second defendant initially denied owing a sum of Australian $725,000 to the deceased, but upon threats of legal proceedings by the plaintiff, he eventually settled to the estate the sum owing together with the interest mentioned in his promissory note.

The first defendant is adamant and denies the existence of the loan stated in the promissory note ('the promissory note'). Thus this action by the plaintiff.

The plaintiff's claim

The plaintiff's claim is as follows:

(1) Against the first and second defendants as executors and trustees of the deceased's estate, for an order that the first and second defendants

do recover for the deceased's estate the sum of RM2.9m with interest thereon at RM15,000 per month from date of loan to date of payment.

(2) Against the first defendant for an order that the first defendant do pay to the deceased's estate the sum of RM2.9m and interest thereon at RM15,000 per month from date of loan to date of payment.

(3) Alternatively, against the first defendant for an order that the first defendant do pay to the plaintiff the sum of RM580,000 and interest thereon at RM3,000 per month from date of loan to date of payment, being the plaintiff's entitlement under the terms of the deceased's will.

(4) Costs.

Procedure

The writ of summons in this case was not served on the second defendant within the prescribed time. Therefore, this suit is only against the first defendant. Counsel for the plaintiff, Mr Lim Chor Pee submitted that this action against the first defendant is sustainable under O 80 r 2(1) of Rules of High Court 1980 ('the RHC'), as well as on the basis that the first defendant is a trustee for the deceased's estate; liability of trustees being joint and several, trustees can be sued and held liable jointly or singularly to pay the damages for breach of trust and since the plaintiff is a beneficiary, she is entitled to claim whole debt from any one of the trustees.

The first defendant made no objection to this either as a preliminary issue or in their substantive submissions.

The defences and the issues

The first defendant denies that he owes or ever owed the deceased's estate the sum stated in the promissory note alleged to be issued by him or any other sums whatsoever, whether in his representative or personal capacity. By the nature of such defence, the first issue is: whether there was a loan of RM2.9m with interest of RM15,000 per month as stated in the promissory note and, if so, that it has remained unpaid.

Then in the alternative, the first defendant claims that even if the loan stated in the promissory note exists and remains unpaid, his appointment as an executor of the deceased's estate extinguishes the debt.

Finally, counsel for the first defendant argues that based on the plaintiff's allegation that the loan stated in the promissory note was given by the deceased to the first defendant on separate occasions, a claim on its repayment is statute barred since it could be more than six years under s 22(3) of the Limitation Act 1953.

First issue — Was there a loan?

The promissory note is dated 18 November 1983. It is on the letterhead of the first defendant. There is no denial by the first defendant that he executed it. It bears the following:

> Dear Mummy,
>
> This is to confirm that I have borrowed from you through Yok Ying Realty Sdn Bhd, the sum of $2,900,000 (Two million and nine hundred thousand ringgit).
>
> Each month, I shall be giving you the sum of $15,000 for which I am not claiming tax deductions.
>
> The principal sum is repayable upon request by you.
>
> Signed ... (first defendant).

Mr Lim Chor Pee enlightened this court that this note having all the characteristics of a promissory note under s 88(1) of the Bills of Exchange Act 1949 ('the Act') is subject to the provision of s 30 of the Act by virtue of s 94(1) thereof.

Section 88(1) of the Act states as follows:

> A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specific person or to bearer.

And s 94(1) contains this:

> Subject to the provisions in this Part, and except as by this section provided, the provisions of this Act relating to Bills of Exchange apply, with the necessary modifications, to promissory notes.

Then in s 30(1) the following appears:

> Every party whose signature appears on a bill is prima facie deemed to have become a party thereto for value.

The significance of these provisions as summarized by Thomson CJ in *Ong Guan Hua v Chong* [1963] MLJ 6 is this (at p 7):

> In the first place what we are dealing with is not an action on an agreement which is set up as a contract, it is an action on negotiable instruments. The difference which is important here is that in an action based on a contract it is for the plaintiff to prove the consideration. In an action on a negotiable instrument, however, consideration is presumed and it is for the maker or the endorser of the instrument if he wishes to defend the action to prove that there was no consideration.

Accepting this role grudgingly of having to rebut this presumption, the first defendant offered the following explanation of there being no consideration ever effected on the promissory note. The grounds are very much similar to the line adopted in his letter dated 31 July 1989 to the deceased's estate's solicitors, M/s Chooi & Co, who were involved in the petition for the probate of this estate. This letter was written almost $2^1/_2$ years after the plaintiff's demand on the first defendant that the debt in the promissory note should be repaid.

According to the first defendant, the deceased was an anxious and nervous person at the material time when the promissory note was issued.

The deceased, he described was the daughter of a wealthy businessman in Hong Kong and had inherited $^1/_{10}$ of the assets of her father. One such asset were shares in a company known as Fung Keong Rubber Manufactory (M) Sdn Bhd ('Fung Keong'). Some such shares were registered in her personal name and others in her personal company — Yok Ying Realty Sdn Bhd ('Yok Ying'). In April 1983, a public listed company in Malaysia desired to acquire Fung Keong. The first defendant handled this deal for the vendors including the deceased. A sale and purchase agreement for the Fung Keong shares was signed with the purchaser in April 1983. But the completion was dependent on various approvals by relevant authorities. This took time causing the deceased great concern. This attitude was, in fact aggravated by the failure of an earlier transaction where the shareholders of Fung Keong were supposed to sell their stake to Sime Darby Bhd.

Around this time, there were also some activities concerning another company. It relates to a company originally known as Concrete Industries KL Sdn Bhd. This company was founded by the first defendant's father and upon his death his substantial shareholdings in this company were inherited by the deceased. The deceased had these shares registered under Yok Ying's name. The first defendant is and/or was also a shareholder of this company. When he became its managing director, he changed its name ultimately to CI Holdings Bhd ('CI Holdings'). Due to bonds and rights issues, Yok Ying's shareholdings in this company increased. And with the first defendant's intention to float CI Holdings in public, two letters by the first defendant to the deceased reflect the situation then. The first letter was written in 1981. It is as follows:

> Dearest Mummy,
>
> ...
>
> Re — Concrete Industries we have asked for a right issue of 1 new share for every 5 shares held now. That means we have put in 20% more capital of what we now hold.
>
> Yok Ying Realty — 611,517 to subscribe 122,303 shares.
>
> TFL Holdings [the first defendant's nominated company] — 896,777 to subscribe 179,355 shares.
>
> Based on the above of 1,508,294 we have to subscribe for $301,658.
>
> You have $70,000 in your account here and I hope to be able to raise the remainder. I am thinking of bringing back some money from Sydney *or* I am thinking of selling the flat in Singapore.
>
> Furthermore, Madam Leong Mai Leng has offered us her shares. If we take it, it will cost us another $45,000.
>
> This is just to let you know. You have done a lot for me so I shall repay part of what I owe you by paying up the rest of Yok Ying's Realty's subscription of $122,303. All you need to do is to put in your $70,000. Is that OK?
>
> I am now working up the proposal for — (Chinese character) to go public. Shall let you know when proposal is ready.
>
> ...
>
> God bless.
>
> Love,
> Vincent

A PS: In case you are worried about money to spend, you have M$2,540 with me every month from January 1981.

Also Concrete Industries will at the end of June pay a 9% dividend on the new increased capital. That means you put in more money but get some back very quickly. In Yok Ying Realty's case, it should get about M$40,000.

B Fung Keong will also be paying a dividend in late Nov of around 6%. Yok Ying Realty should get around $50,000.

The second letter is dated 4 March 1982 and it contains this:

...

I shall write to you re Fung Keong later. I get quite depressed and frustrated C when I speak with you over the phone. You are always so scared of doing business. You want to pay back the M$1m to Auntie Lucia when I asked for it for a maximum of two years. I know the interest may be high, but the returns on the investments, ie buying of CI Holdings shares are expected to be much higher.

This is my work and I should know CI Holdings. You will also make a lot D of money from the shares of CI Holdings — but you have to be a little more patient. I am serious when I told you that I shall be retiring by the end of 1985. I want to start another business on my own then — a business where I own 100% and I shall probably have to work even harder, but with less ulcers.

Take care.

E Love,
Vincent

Also around this time, the first defendant claimed that he was a frequent traveller. This worried the deceased for she felt that if any misfortune befell upon the first defendant she would be left 'empty handed.'

F Under these circumstances the first defendant stated that: 'In November 1983, in order to allay her ('the deceased') concern and to stop her from asking me how the sale of FKRM ('Fung Keong') is progressing each time I saw her, I wrote her that IOU note telling her that now if something should happen to me and the FKRM deal, she would be financially secured. Above all, I wrote that note because I was grateful for G her support over CIH (CI Holdings)', and 'The undertaking and spirit of my writing that note is that my late mother would benefit only if my death preceded hers; it was never meant for her estate.'

The first defendant vehemently denied ever receiving a sum of RM2.9m as loan from the deceased; though there were occasional small H loans given by the deceased to him previously, he had repaid those in full .

Great effort and concentration were directed by the first defendant to impress this Court that in none of the bank statements of the deceased, either here or in Hong Kong, as well as those concerning the accounts of Yok Ying, reflect an amount equal to that of RM2.9m ever possessed by or disposed of by the deceased or Yok Ying during or around the period when I the promissory note was given to indicate no such loan was ever given by the deceased.

After perusing the entire evidence as a whole, I am not convinced by the explanation offered the first defendant to rebut the presumption of consideration being given in the promissory note.

Firstly, I cannot find the logical basis proffered by the first defendant in executing the promissory note to allay the fears of the deceased.

Though the deceased may have pestered the first defendant incessantly on when the Fung Keong transaction could be completed, there was no reasonable justification to warrant the issue of this note as a security. The Fung Keong shares were in the names of the deceased or her company Yok Ying. Even if the first defendant was to meet with an accident and died, the proceeds of sales of Fung Keong shares would still be paid to the deceased and/or Yong Ying being the registered owners of these shares. The first defendant was only acting, to a substantial degree, a go-between the purchaser and the then shareholders of Fung Keong. He did not hold any substantial shares of the deceased and/or Yok Ying on trust.

Secondly, in a sort of statement of accounts (the statement of accounts) acknowledged to be written by the first defendant on 16 April 1984 (found in p 10 of encl 63), at the bottom section the following is exposed:

Dec '83	M$15,000	to HK	M$45,566.65
Jan '84	M$15,000		M$20,000.00
Feb '84	M$15,000		
March '84	M$15,000		M$65,566.65
	M$60,000		
	M$40,000		
	M$100,000		

I owe you $34,433.35 to be put back into your account.

The first defendant denied that the payment listed herein were payments for interest to the deceased. He insisted that those figures, particularly showing M$15,000 were monthly payments for spending money he gave to the deceased while she was awaiting the proceeds of the sale of Fung Keong shares to arrive. To me, this sounds rather improbable. It seems rather odd for a son to give such a formal and proper record for pocket money paid out of love and gratitude to someone so dear as his mother. I am more inclined to accept that these recordings are associated with the interest payments agreed upon by the first defendant in the promissory note. The dates and the amount paid are closely aligned to that stipulated in the promissory note. The first payment of RM15,000 recorded here commenced just a month after the promissory note was made — as obligated by the first defendant in the promissory note to pay. And the exact sum of $15,000, no more no less, was paid on each succeeding month — again as agreed upon in the promissory note. The mode and manner of these payouts make it highly improbable to categorise them as spending money to 'dear Mummy.'

My third reason is again in reference to the statement of accounts. But this involves the top section which bears:

A Sale of Fung Keong Rubber Manufactory (M) Sdn Bhd

$34,500,000 / 1,800,000 = $19.1666 per share

B 178,200 shares x $19.16 = $3,415,500

99% of $3,415,500 = $3,381,345

C

To Hong Kong					
$44,420	3/84)		$3,381,345	Elizabeth	$229,845.14
$177,926	3/84)	-	1,419,440	Alice	229,875
$177,326	4/84)	=		Chun	229,875
$399,672	)		$ 1,961,905	Vincent	500,000
		-	399,672	Lawrence	299,845.14
			$ 1,562,233		1,419,440.28
		-	1,348,635		=========
D $625,000			$ 213,598		
			========		

E By the first defendant's clarification, these figures show the proceeds received from the sale of the deceased's and/or Yok Ying's shares in Fung Keong. A major portion was given by the deceased to her five children, including the first defendant who received RM500,000. If the reason for the execution of the promissory note was to comfort the fears of the deceased for being left 'empty handed' in case the first defendant dies prematurely before the proceeds of this sale arrived, why was this document not cancelled when the entire amount for the sale was received? By this time, no comfort is necessary since the deceased was in possession of a substantial fortune in cash, part of which she could even offer the second defendant as a loan and gave another portion of it to the children. Instead of destroying this promissory note she retained this document, and secured it, not in any ordinary area but, in a safe deposit box which she operated solely.

G One obvious question, after reading the two letters and the explanation offered by the first defendant to rebut the presumption of consideration being given for the promissory note, is the movements of the CI Holdings shares belonging to Yok Ying. The first defendant, in examination-in-chief, disclosed that when he undertook a corporate exercise in 1982 to float CI Holdings as a public listed company he needed RM5m to take up some rights issues in the company. Not having such kind of cash, he explained that the deceased gave him Yok Ying's shares in CI Holdings. These were subsequently, or otherwise, transferred into his own holding company — TFL Holdings Sdn Bhd and pledged for loans to enable him to take up the said share issues. The first defendant then insisted that these Yok Ying's shares in CI Holdings were given to him by the deceased as a 'gift', which he had declared in his estate duty declaration on the deceased's estate.

I The plaintiff cross-examined on this. I allowed it since this assertion was revealed in examination-in-chief. When it came to submissions, the first

defendant took objection to the plaintiff's attempt to link the transfer of these shares, claimed by him to be a gift, as consideration for the promissory note. The first defendant's argument is that this was not pleaded by the plaintiff in her pleadings.

I am greatly astonished by such a claim, which I find to be completely devoid of merits and substance. The plaintiff had alleged the existence of the promissory note which the first defendant did not deny having executed. The first defendant then attempted to rebut it for want of consideration. In doing so he revealed the deceased's interest in CI Holdings through the shares held by Yok Ying. The plaintiff cross-examined on this and proceeded to challenge the denial of consideration on the probability that the transfer of these shares could be the consideration for the promissory note. The plaintiff is certainly at liberty to draw such inference. This is made to challenge the first defendant's attempt to rebut the presumption of no consideration. She cannot be prohibited from doing so based solely on the claim that this was not pleaded in her pleadings. Her plea of the existence of the promissory note is sufficient and adequate since it is on this note that she relies her claim; see *William v Wilcos* 112 ER 857 and *Re Estate of Lee Siew Kow, decd; Gan Eng New & Ors v Yeo Siew New* [1951] MLJ 224. Whatever evidence extracted from the first defendant's testimony she can utilize for the purpose of rebutting the presumption of consideration given in the promissory note.

Based on what is divulged I cannot help but to be convinced that the first defendant has failed to rebut the said presumption. The promissory note was given prior to a period where the first defendant was seeking financial help from the deceased. This is all expressed in the correspondence I have elaborated earlier. Loans had been made to the first defendant not only by the deceased but also by a relative — Auntie Lucia's RM1m borrowing with relatively high interest. The first defendant was intending to make a killing with the listing of CI Holdings. But before this could materialize, more funds were needed to inject into the company from shareholders. From the letters, the deceased was reluctant to invest. So her shares, or those controlled by her through Yok Ying, in CI Holdings were used to pledge as security for bank loans to the first defendant. These shares were evidently transferred to the first defendant's nominated company. The first defendant claimed that these were gifts but I think otherwise. Most probably they were to form part of the consideration of the promissory note. From the correspondences I referred to, the deceased required investment returns as part of her income. This can be extracted from the first defendant's letter to the deceased in 1981. There the first defendant assured her that he would be forwarding her RM2,540 each month, and the dividends from both CI Holdings and Fung Keong would also be forthcoming. With these, it was unlikely that the deceased would depart with her shares, or those under her control, in CI Holdings without some consideration. In fact the contents of the promissory note itself seem to reinforce this association. It refers to the borrowing 'through Yok Ying Realty Sdn Bhd'; and Yok Ying were then the registered owners of these shares.

Another point strenuously argued by the first defendant is the absence of any entry in the bank statements of the deceased (both here and in Hong Kong) and Yok Ying which record the existence of the sum of RM2.9m or anything close to this figure to reflect the consideration in the promissory note. If there was no such amount ever at the material time in existence, no loan could be granted by the deceased or Yok Ying.

After examining all relevant documents, I do not agree that by this contention alone it is sufficient to disprove the presumption of consideration in the promissory note. Indeed by these bank statements the deceased never held an amount equivalent to that in the promissory note. But can this be of material significance when firstly, at the time of the deceased's death a considerable amount of money belonging to her was placed in fixed deposit and not in these current account? Secondly, even when she received the proceeds of sales of her Fung Keong's shares, such gains were never reflected in these current bank account statements. Obviously, this indicates that she did not practise placing large amounts of her money in current account. Thirdly, there is and/or was no necessity to pay into a current account before any sum of money is cashed out from a fixed deposit placement. A banker's cheque direct to any payee nominated by the drawer of the fixed deposit is sufficient to draw out such sums without having to go through a current account. Fourthly, the consideration for the promissory note need not be in the form of cash payment — the probability, as this court has found, was the deceased and/or Yok Ying's shareholding in CI Holdings transferred to the first defendant.

Based on the aforesaid reasons, I find that the first defendant has failed to rebut the presumption for want of consideration as set out under s 30 of the Act.

Second issue — Will the appointment of the first defendant as the executor of the deceased's estate extinguish the loan?

Having found that the loan exists by virtue of the promissory note, the next issue is whether the appointment of the first defendant as the executor of the deceased's estate by the deceased will extinguish the loan.

At common law an appointment by the testator of his debtor whether he was the sole debtor, or of the several joint debtors, or even one of the joint and several debtors to be his executor operated as a release or extinguishment of the debt, on the principle that a debt is merely the right to recover the amount by way of action, and as an executor could not maintain an action against himself, his appointment by the creditor to that office suspended the action of the debt; and where a personal action was once suspended by voluntary act of the party entitled to it, it was forever gone and discharged' — *Williams, Mortimer & Sunnucks on 'Executors, Administrators Probate'* (16th Ed) at p 595.

But equity does not consider the legacy to the debtor as necessary, or even prima facie, a release or extinguishment of a debt. Collins MR in Bourne, *Re Davey v Bourne* [1906] 1 Ch 697 explains (at p 707):

> ... He is an executor owing a sum of money to the testator at the time of the testator's death. Being an executor there was a difficulty about suing him at common law. He being both the person to receive and the person to pay, he could not be made responsible, but the whole matter is now governed by the rules of equity, and the executor is deemed as debtor to have paid himself in a fiduciary capacity as executor, and he is deemed to be in possession of the sum which he owed to the estate ... .

A B

But this can be rebutted if the debtor can prove that the testator clearly and continuously intended to release the debtor of his debt, for example by making an absolute gift by will to the debtor, and directing the debt to be brought into hotchpotch — see *Williams, Mortimer & Sunnucks on 'Executors, Administrators & Probate* (16th Ed) at p 592; *Strong v Bird* (1874) LR 18 Eq 315; *Re Applebee; Leveson v Beales* [1891] 3 Ch 422; *Re Hyslop; Hyslop v Chamberlain* [1894] 3 Ch 522.

C

It is a fact that the first defendant under the will of the deceased is appointed an executor of the deceased's estate. In equity, he is deemed to have repaid the loan disclosed in the promissory note to himself as executor and trustee of the deceased's estate, and thus possesses this full amount of the debt in his hands. If he wishes to rebut this, he has to forward evidence to show that the deceased had clearly and continuously intended to forgive the debt. But I find no evidence of this. The first defendant was too preoccupied in his attempt to convince this court that there was no consideration given in the promissory note that he neglected to concentrate on rebutting this equitable presumption. Further, there appears evidence to contradict his submission that the debt has been forgiven.

D E

The promissory note was executed in 1983. It was never destroyed by the deceased despite periods where she had substantial income received from the sales of her Fung Keong shares, and had given a considerable part of the proceeds to the first defendant. She kept this note right up to the time of her death, in a safe deposit box under her own name, not those she shared with the first defendant. These are facts very indicative that the deceased had not released the first defendant of his obligation to pay.

F

Then there is evidence that family members of the deceased had prior knowledge of this loan even before the promissory note was recovered from the deposit box. Elizabeth had informed her solicitors of this loan by letter on 22 April 1987 (p 235 of encl 65), months before the promissory note was found on 6 July 1987. Both the plaintiff and the first defendant agree that Elizabeth was close and affectionate to the deceased. As Elizabeth had knowledge of this loan even before the promissory note was recovered, then in all probability the deceased must have confided in Elizabeth this borrowing. If the debt was forgiven, the deceased would not have disclosed the loan to Elizabeth and Elizabeth would not have proceeded, even before the promissory note was recovered, to announce it to her solicitors.

G H

The first defendant claimed that in the subsequent years following the deceased's death, Elizabeth and himself had made up after their acrimonious relationship, caused by the demand for the repayment of this loan, and Elizabeth had declared to him that she did not believe such a loan

I

ever existed. But this is a statement from the first defendant alone. Elizabeth, unfortunately, passed away in July 1989, soon after she withdrew her application in April 1989 to be an executrix of the deceased's estate; by which time she was in poor health. This assertion is difficult to accept as credible and relevant. If Elizabeth had made such a confession, why did she not put this in writing since it may have a great bearing on other members of the family and solicitors? Secondly, the issue here is not whether the loan exists, but whether it was forgiven by the deceased. Thirdly, one cannot deny the fact that the loan was known to Elizabeth even before the promissory note was recovered.

Without substantiating evidence advanced by the first defendant to rebut the equitable principle expressed, this second contention of the first defendant must fail.

Third issue — Whether the plaintiff's claim is statute barred

The first defendant submitted that since the plaintiff has alleged that the loan of RM2.9m was made on diverse occasions without any specific period by the deceased to the first defendant, there is a possibility that some, if not all, of these loans are statute barred by s 22(3) of the Limitation Act 1953. I think the first defendant must have been mistaken as to the relevant section of the Limitation Act to be applied to support his contention. He quoted s 22(3) which to my mind has completely no logical connection to what is alleged. The closest provision which may be of some relevance is s 22(2) which reads:

> Subject as aforesaid, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued ... .

But by an earlier s 22(1)(b) of the Limitation Act:

> No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action
>
> (b) to recover from the trustee trust property or proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.

Applying the equitable legal concept that the loan was repaid by the first defendant as a debtor to himself as executor of the deceased's estate, the first defendant became a trustee of this repaid debt — which has become a part of the trust property of the deceased's estate. The plaintiff is a beneficiary of the estate. Since she is bringing this action as a beneficiary to recover from the first defendant as trustee of the estate holding the trust property (which includes the repaid debt), no statutory period of limitation applies against her.

Even if s 22(1)(b) of Limitation Act is not applicable, then under s 22(2) of this same Act one relevant factor to consider is that the period of limitation begins 'from the date on which the right of action accrued.' This

could be as the plaintiff argued: (a) upon the death of the deceased on the 22 February 1987; or (b) when the promissory note becomes payable on demand. On the first, the plaintiff is not out of time. She was well within the 6 years when this writ was filed in October 1989. On the second, there was a demand on the 21 July 1987 (p 34 of encl 53) by the plaintiff of the first defendant to repay the debt as stated in the promissory note. Again the date is well within the period stipulated under this particular section.

On these grounds, I find no support for the first defendant's third contention that the plaintiff is out of the time imposed by statute to commence her claim against the first defendant.

Conclusion

By reasons aforesaid, I find for the plaintiff in this case. Accordingly, I hereby allow prayer (ii)(a) of the plaintiff's claim with costs.

Plaintiff's claim allowed.

Reported by Lynette Tan Ping